SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

UNCLASSIFIED | CONFIDENTIAL | SECRET

OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	Mr. Edward Brooks 7-D-18, Headquarters		
2	OGC Has Reviewed		
3			
4			
5	MORI/CDF Pages 3 thru 8 & 20 thru 34.		
6			

	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

Ed:

I think the rationale is looking better all the time. I do feel, however, that the retirement policy should be given a more prominent part in this paper and have taken the liberty of revising paragraphs 1 and 2 to make this point. I offer it as a suggestion only, because I remember that when the paper was being written on retiree travel we were asked to concentrate on the retirement policy more than other limitations on Agency employees.

STAT

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
DD/Pers/SP 5E67 HQ	7 OCT 1971

UNCLASSIFIED | CONFIDENTIAL | SECRET

FORM NO. 237 1-67 Use previous editions (40)

other

Rationales -

1) for mandatory retirement age 60 —
based on need for dynamic, innovative personnel with highest level of effectiveness, need for more rapid attrition.

2) CIARDS death + retirement travel benefits to CSC retirement participants. —
based on equalizing benefits for all employees and administratively adopting a law of the Foreign Service.

3) adoption of administrative benefits of Foreign Service acts + amendments and other laws —
based on inability to get numerous + rapid amendments to PL 81-110 + desire of Congressional Committees that we do what we can with our special authorities without numerous law changes.

SECRET

25 March 1971

MEMORANDUM FOR: Deputy Director for Support

SUBJECT : Administrative Adoption of Statutory Benefits

REFERENCE : Memo dtd 29 Dec 70 to D/Pers and SSA/DDS fr DDS, subj: Travel Benefits for Civil Service Retirement System Participants

1. Pursuant to referent memorandum, this office, in collaboration with the Director of Personnel and the Deputy General Counsel, has developed the attached memorandum for your signature which recommends the extension of the same death and retiree travel benefits for participants in the Civil Service Retirement System as are now provided for participants in the Central Intelligence Agency Retirement and Disability System. We believe this new memorandum provides a completely justifiable rationale for the proposed action. We recognize this is a rather lengthy document but feel it desirable to have a comprehensive statement of the reasons for approval for the record. With the number of retirements scheduled between now and the end of this fiscal year we urge early consideration and approval.

2. From the earlier studies made by the Director of Finance on the added cost of the proposed benefits, we established that the average is $1,500.00 per employee and that only about 25 percent of those retiring under CIARDS had then opted to move to a new retirement point. Considering the deferment of move within the regulatory six months and extensions of actual date of retirement move beyond the regulatory six months, the 25 percent is undoubtedly low but the average cost per move was arrived at on a voucher-by-voucher review. From 1 July 1970 through 31 March 1971, a total of 186 CSRS participants will have retired and between 1 April and 30 June 1971 we expect roughly 140 more such retirements. Funds for these retirements do not have to be centrally budgeted; the individual offices/divisions/staffs having the retirees would be expected to fund the cost for their retirement travel and we believe this would pose no unusual problems.

SECRET

3. While the proposal in the attached memorandum seeks only a limited additional benefit for participants in the CSRS, it is interesting to note that the Department of State is proceeding rapidly to afford all of its career officer CSRS participants the full benefits of the Foreign Service Retirement System. Management Reform Bulletin # 8 dated 16 February 1971 subject "Toward a Unified Personnel System--The Foreign Affairs Specialist Corps" states that the Department of State "will seek conversion to the new Foreign Affairs Specialist Corps, on a voluntary basis, of eligible career Civil Service Officers, Foreign Service Reserve Officers, Foreign Service Staff Officers, and a few Foreign Service Officers". Those General Schedule graded employees who convert to Foreign Service Officer or Foreign Affairs Specialist will be encouraged but not required to serve abroad if they are now age 50 or over. Exceptions from overseas service for other officers will be made on the basis of staffing needs for their specialty or to accommodate medical or family problems. It is also interesting to note that hereafter, the Department of State will make no new officer appointments in the General Schedule category, i.e., all new officer appointments will be covered under the Foreign Service Retirement System.

[redacted]
Special Support Assistant/DDS

25X1

Att

25X1 CONCUR:

[redacted]
Harry B. Fisher
Director of Personnel

25 March '71
Date

25X1

[redacted]
John S. Warner
Deputy General Counsel

25 March '71
Date

SECRET

MEMORANDUM FOR: Executive Director-Comptroller

SUBJECT : Administrative Adoption of Statutory Benefits

REFERENCE : Memo dtd 23 Jun 70 to DDS fr General Counsel, same subj

1. Paragraph 7 of this memorandum contains a recommendation for your approval.

2. In referent memorandum the General Counsel has stated there would be no legal objection to the Agency extending to participants under the Civil Service Retirement System (CSRS) the same retiree and death travel benefits as are now provided for participants under the Central Intelligence Agency Retirement and Disability System (CIARDS).

3. There was a discussion of this subject in a Deputies meeting on 15 July 1970. In considering the proposal to extend such benefits to all participants in the CSRS, it was decided to return the proposal to the Deputy Director for Support for further study on whether there should have been some demonstration of mobility during Agency service, either by PCS or TDY. Since then we have restudied the problem, including a review of the events which led to the Agency Career Staff concept. The deliberations of the former CIA Career Council were examined against the question of whether from the early 1950's on the Agency ever made any significant departures from requiring the basic obligation by all employees to serve anywhere and at any time and for any kind of duty as determined by the needs of the Agency. The discussions and debates considered whether: the Career Staff would be an "Elite Corps", encompassing only a portion of the employees; we would have what would equate to an "Officer Corps" and an "Enlisted Corps"; married females whose husbands were not Agency employees should be in the Career Staff. After all was said and done, the pattern then, as now, is to treat all employees alike, the element of mobility being presumed in all employees who assume the obligation. The fact that many were ready and eager to move to a new

SECRET

location but were never able to for reasons beyond their control would again penalize them if demonstrated mobility were to be a condition precedent to granting additional employment benefits. We therefore can find no valid reason for suggesting a half-way measure which by its very terms would be an equivocation with the basic point involved, that is, whether to grant equal treatment to all employees whenever that is possible and desirable.

4. On 3 May 1968, the Director of Central Intelligence decreed that it would continue to be Agency policy that employees under the CSRS will be required to retire at age 60, or as soon thereafter as they are eligible for optional retirement under the law. In addition, all participants in the CIARDS must retire at age 60. As early as 1959 the retirement policy of the Agency was that employees would be expected to retire at age 60 with 30 years of service or at age 62 with at least 5 years of service under the then existing optional retirement provisions of the CSRS. In 1968 exceptions were made for a few employees who either would not have 30 years service at age 60 or who had been promised they might remain to age 62 on the basis of earlier commitments by the Agency. Exceptions were also made for a group of 57 printers who transferred to the Agency from the Government Printing Office with assurance they would lose no benefits by such transfer, including the right to remain employed until the CSRS statutory age of 70. Paragraph 12 of the rationale for the general retire-at-age-60 policy (attached to the memorandum approved by the Director on 3 May 1968) is pertinent to this memorandum.

> "12. In summary, the age 60 retirement policy is a key element of the Agency's efforts to attain excellence in its staffing. Without the policy the entire personnel program of the Agency would be impaired. The most vigorous and productive individuals, finding themselves stymied, will leave the service or will never be persuaded to enter in the first place. By shortening the career span of all employees, service in intelligence will continue to be highly attractive to outstanding young men and women. In the end, our national intelligence objectives will be best served."

5. In addition to the early retirement consideration, it is believed our employees are significantly different from employees of the Federal government at large. There are many exclusions and exemptions from normal Federal personnel practices, procedures and policies applicable to employees of the Agency. Congress has excepted the Agency and its employees from many of the laws governing the rights, benefits and control of government employees, including the Classification Act, Veterans'

Preference Act and civil service and judicial procedures for appeal of personnel actions. Agency employees as a group serve under unique circumstances, and recognize that while they are Federal employees, the special strictures and requirements of their employment cause them to look to the Agency and not to the Congress, courts or another part of the Executive Branch, such as the Civil Service Commission, for establishment or adjudication of their rights and benefits. Their social associations and personal travel are subject to Agency approval; their ability to remain employed after marriage to an alien is subject to Agency approval; they cannot acquire Civil Service status; and have no intra-agency "bumping rights" during a reduction in force. In some instances their inability to fully describe job duties limits their ability to compete for employment opportunities with private institutions.

[redacted]

6. We believe that there is ample evidence to show that the conditions of employment for all Agency employees in the categories of staff employee, staff agent, career agent, and contract employees, who converted to such status from staff status without a break in service, are such as to set them apart from the overwhelming majority of Federal employees. Within the Agency family there should be the fewest possible criteria of differentiation in the interest of high morale and uniform administration for all. We have an opportunity to remove one differentiation by extending to participants in the CSRS the same retiree and death travel benefits as are now provided to participants in the CIARDS. Having deliberately established a basic policy requiring retirement at age 60 under CSRS under the basic premise that such action was deemed necessary for the proper administration of all employees of the Agency it would appear logical to extend that policy to include these benefits in order to make it as equitable as is possible. Providing CSRS participants death travel benefits and travel and movement of household effects to a retirement point at a new location is just as necessary as it is for CIARDS participants. I believe that we should provide

those benefits only to those employees in the CSRS or CIARDS systems who in fact retire at age 60 or as soon thereafter as they are eligible for optional retirement, unless the employee's retirement is extended by the Agency but in no event will the benefits be available after age 62.

7. In line with the above, and pursuant to the authority delegated to you by the Director of Central Intelligence on 5 October 1967, it is recommended that effective with the date of your approval you determine it to be necessary for the proper administration of all employees of the Agency to extend to participants in the CSRS the same death and retirement travel benefits now approved for CIARDS participants, provided the employee:

a. Is a staff employee, a staff agent, a career agent, or a contract employee converted from staff status without a break in service;

b. Retires voluntarily or involuntarily on or before his 60th birthday;

c. If not eligible for retirement at age 60, retires as soon after his 60th birthday as he becomes eligible for optional retirement; or

d. Retires at his 62nd birthday when his extension beyond the date of his eligibility for optional retirement was approved by the Agency.

John W. Coffey
Deputy Director
for Support

The recommendation contained in paragraph 7 is approved.

Executive Director-Comptroller

Date

SUBJECT: Administrative Adoption of Statutory Benefits

Distribution:
Orig - Addressee (for return to DDS)
1 - DCI
1 - DDCI
1 - Ex. Dir. - Compt.
1 - ER
1 - OGC
1 - OLC
1 - IG
1 - ONE
1 - DDI
1 - DDS&T
1 - DDP

SECRET

30 April 1968

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT : Retirement Policy

1. This memorandum submits recommendations for your approval in paragraph 4.

2. During the past several weeks I have reviewed the Agency's retirement policy with the Deputy Directors, the General Counsel, the Inspector General, the Director of Personnel, and the Chairman of the CIA Retirement Board.

3. Our discussion and conclusions are summarized as follows:

a. The National Security Act of 1947, Section 102 (c), provides, "Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

b. The principal issue of our discussion, and from which all others flow, is whether the Agency should have a policy requiring retirement earlier than provided by law under the Civil Service Retirement Act or the CIA Retirement and Disability System for GS-18s and above. After considerable discussion, it was the consensus that there should be an early retirement policy with a stipulated age at which most employees

should leave. At the same time, it was recognized that, because the Directorates have different problems, Agency policy should be flexible enough to permit liberal exceptions when justified. This appears to be particularly true in the Intelligence Directorate because of the various types of professional employees needed and because these professionals often are individuals who have prepared themselves through academic study for long-range professional careers where an arbitrary retirement age would not be a condition of employment. Rationale in support of such a policy is attached at Tab A.

c. Having reached agreement that the Agency should have an early retirement policy with provision for exceptions to meet particular needs or circumstances, we then discussed the types of exceptions that could be identified and action recommended in advance. General agreement was reached on the following:

(1) There should be no general exception for employees who argue that at the time they entered on duty they were led to believe (or now believe) that they had the right to work until age 65 or 70, depending on the retirement system in which they participate.

(2) There is a small group (12) of Agency employees who will not have 12 years of creditable service by their scheduled retirement date. We feel that these employees, as a group, should be permitted to remain on duty until they accumulate 12 years of service when they earn the right to continue important statutory hospitalization and life insurance coverage.

(3) As originally conceived in 1959, our early retirement policy expected employees to retire at age 60 with 30 years of service or at age 62 with at least 5 years of service. When the Civil Service Retirement Act was amended in 1966 to include a provision for optional retirement at age 60 with 20 years of service, Agency policy was in turn revised. There were some employees who prior to the revision of Agency policy had been informed

that their scheduled retirement would be at age 62 and presumably planned accordingly. With the change, their scheduled retirement age was lowered to 60. We feel that these employees should be permitted to remain on duty until age 62 if they so request. This does not include those employees who at age 60 have at least 30 years of service since this was a requirement under the earlier Agency policy.

(4) An overall exception should be made for the group of printers (57) who were induced to transfer from the Government Printing Office to the Agency with the assurance that they would not lose any benefits.

(5) There should be no overall exception for lower graded clerical employees. Each such case should be considered on its own merits.

(6) There should be no overall exception for employees with technical skills in grades GS-7 and below even though it might be difficult to recruit replacements and their loss would create training problems. Each such case should be considered on its own merits.

(7) No overall exception should be made for employees merely because they are writing Agency history.

4. It is recommended that:

a. Agency policy continue to provide that employees generally will be required to retire at age 60 or as soon thereafter as they are eligible for optional retirement under the law, regardless of whether they are covered by the Civil Service or the CIA retirement system.

b. Exceptions to the general policy be considered by the Director on an individual case basis when requested by the Head of Career Service or a Deputy Director.

Approved For Release 2006/11/11 : CIA-RDP84-00780R004200110005-1

RETIREMENT RATIONALE

1. The production of intelligence bearing on the national security for use at the highest levels of policy determination of the United States Government is a responsibility of the gravest note. The organization bearing this responsibility should be staffed with persons of the highest available intellect, integrity, professionalism, dedication, perspicacity, and dynamism. The Central Intelligence Agency's retirement policy is an essential element of its program for ensuring that its staff possesses these attributes to the highest degree feasible.

2. The personnel staffing program of the Agency is based on the concept of selective recruitment for career employment and managed career development. Selection standards are designed to accept only persons with the highest qualifications and potential for development. The Agency's development program provides a career-long blend of formal training and managed progression through appropriate assignments of increasing breadth and responsibility.

3. The goal of the Agency's development program is to place the best available employee in every position. Promotion policy reinforces career development by advancing those who excel and have the capacity for further growth. The Agency's rigorous system for evaluating the performance of its employees is designed to assure high levels of effectiveness. Those who are unsatisfactory are separated; those who are marginal or unlikely to find full career satisfaction are counseled to resign.

4. Intelligence activities are characterized by continuous changes--in requirements, methods, techniques, processes, and emphases. As these changes occur, the Agency reassigns its career staff employees and provides supplementary training as required. To the extent that these measures do not meet the needs, requisite skills, experience, and special abilities are acquired by the employment of new personnel.

5. Because there are practical limits to the size of the Agency, the requirement for new employees and the operation of the career development program cannot be accomplished without attrition. Part of this attrition is provided by involuntary separations and resignations through the Agency's system for evaluating employee performance. Other vacancies are provided by voluntary retirement and resignation and by death and disability. But together these do not create a sufficient number of vacancies.

6. The Agency's retirement policy is an integral part of its program to maintain the high level of performance required by its mission and responsibilities. It also provides the additional attrition necessary for career development and the acquisition of new employees. This policy, adopted in 1959, generally limits the career span of its employees to age 60.

7. Agency employees, with some exceptions, have all attained their career peaks several years before reaching age 60. They have had a full CIA career and have made their maximum individual contribution to their Government. Exceptions specifically contemplated are individuals who possess rare scholarship and talents that would be difficult to replace in the normal course of career development and whose retirement would not be in the best interests of the Government. In some cases retirement at 60 may result in loss of valuable experience and know-how and only generate a recruitment and training requirement.

8. It is recognized that enforcement of the policy to retire employees at age 60 occasionally subordinates the personal desires of the individual to the best interests of the Government. This is usually the case when it is necessary for any reason to separate an employee. The normal voluntary retirement age for most Federal employees is 65, and the compulsory age under the Civil Service system is 70. Similar retirement ages for CIA would result in the gradual accumulation of an excessive number of employees of declining performance, whether due to declining health, motivation, or drive or to inability to adapt to change. The effectiveness with which the Agency fulfills its extraordinary responsibilities depends entirely upon the highest possible level of effectiveness in staffing the Agency. Consequently, extraordinary action toward attaining

and maintaining this goal--such as effecting a retirement policy more stringent than that for the Federal service in general--is warranted.

9. Retirement at age 60 may appear less appropriate for those Agency employees who are in positions that are not unique to intelligence activities. In theory, it might be possible to identify all such positions and exempt the incumbents thereof from the retirement policy.

10. There are two reasons for not doing so. Attempts to formulate criteria of differentiation would generate new problems of morale and administration. The creation of exempt categories of employees would foster odious comparisons. It would thwart the implementation of the general retirement policy indefinitely as groups and individuals pleaded their individual cases.

11. The more fundamental reason for not exempting certain categories of Agency employees is that the work of the Agency must be performed with utmost responsiveness. This requires a general state of mind on the part of all employees that timeliness is critical, accuracy is imperative, and absorption with the task at hand takes priority over personal distractions. Advancing years inevitably bring about a lessening of work vigor and enthusiasm. The larger the proportion of older employees, the greater the debilitating effects on the tenor of the Agency.

12. In summary, the age 60 retirement policy is a key element of the Agency's efforts to attain excellence in its staffing. Without the policy the entire personnel program of the Agency would be impaired. The most vigorous and productive individuals, finding themselves stymied, will leave the service or will never be persuaded to enter in the first place. By shortening the career span of all employees, service in intelligence will continue to be highly attractive to outstanding young men and women. In the end, our national intelligence objectives will be best served.

[redacted]

ITEM	CENTRAL INTELLIGENCE AGENCY EMPLOYEES UNDER CIARDS	CENTRAL INTELLIGENCE AGENCY EMPLOYEES UNDER CSRS	OTHER U.S. GOVERNMENT AGENCIES NOT IN INTELLIGENCE COMMUNITY
[illegible]loyment eligibility having alien spouse or foreign relatives	Can be disqualifying	Can be disqualifying	Normally not disqualifying
EOD and recurring polygraph exam	Required	Required	Not required
Private foreign travel	Must be reported and can be prohibited	Must be reported and can be prohibited	Not prohibited - no report required
✓ Marriage to an alien after employment	Must be reported and can require loss of job	Must be reported and can require loss of job	No job jeopardy - no report required
Public speeches and writing - Job Prohibited	Subject to clearance in advance	Subject to clearance in advance	Normally no prohibition or clearance required
✓ ssociation with foreigners	Must be reported and can be prohibited	Must be reported and can be prohibited	Not prohibited - no report required
ccepting outside (2nd) job unrelated to official duties	Subject to prior approval	Subject to prior approval	No approval or report required
✓ Accepting outside (2nd) job related to official duties	Prohibited	Prohibited	Normally allowed
Joining outside activities	Subject to prior approval	Subject to prior approval	No approval or report required
Contacts with press, radio, TV	Subject to prior approval	Subject to prior approval	No approval or report required
✓ Concealing true employer	Sometimes required	Sometimes required	Never required
✓ Private discussion of work/associates	Prohibited	Prohibited	Seldom prohibited
✓ Obligation to serve where required in whatever type of work required	Applies	Applies	Normally no obligatory relocation required
✓ Involuntary separation	No outside appeal under DCI authority, Sec. 102(c) NSA of 1947	No outside appeal under DCI authority, Sec. 102(c) NSA of 1947	Appeal rights guaranteed by Veterans Preference Act and Lloyd-LaFolette Act

CONFIDENTIAL

EMPLOYMENT AND BENEFITS COMPARISONS (cont.)

	ITEM	CENTRAL INTELLIGENCE AGENCY EMPLOYEES UNDER CIARDS	CENTRAL INTELLIGENCE AGENCY EMPLOYEES UNDER CSRS	OTHER U.S. GOVERNMENT AGENCIES NOT IN INTELLIGENCE COMMUNITY
✓	Mandatory retirement	Age 60	Age 60	Age 70
	Computation of retirement annuity	Straight 2% x high 3 x yrs service maximum of 70% of high 3	1st 5 yrs, 1½%; 2nd 5 yrs, 1 3/4%; over 10 yrs, 2%; x high 3 x yrs service (computation 3.75% less than under CIARDS) Maximum of 80% of high 3	1st 5 yrs, 1 1/2%; 2nd 5 yrs, 1 3/4%; over 10 yrs 2%; x high 3 x yrs service Maximum of 80% of high 3
	Free move to point of retirement	Authorized	Not authorized unless retirement is directly from overseas post	Not authorized unless retirement is directly from overseas post
	Movement of family and HHE following death in service	Domestic or overseas - to any point selected in U.S., possessions or P.R.	Domestic - not authorized Overseas - to any point selected in U.S., possessions or P.R.	Domestic - not authorized Overseas - to former home
✓	Selection out and Surplus Separation Procedures	Applies	Applies	No comparable procedure
✓	Acquiring permanent Civil Service status	Not permitted--CIA gives excepted appointments which have no value in transferring to majority of other U.S. Government agencies	Not permitted--CIA gives excepted appointments which have no value in transferring to majority of other U.S. Government agenices	Permanent status is acquired after 3 year probationary period. Thereafter free movement to other U.S. Agencies permitted
✓	Entitlement to another job in same organization when reduction-in-force occurs (i.e., "Bumping Rights") based on length of service and Veterans Preference)	No entitlement	No entitlement	Guaranteed entitlement under rigid Civil Service Commission regulations based on law
	Reporting personal whereabouts during absence from duty	Required	Required	Not normally required
✓	Personal life/term insurance	Frequently cannot qualify through inability to reveal job duties and requirements	Frequently cannot qualify through inability to reveal job duties and requirements	Complete revelation permitted

CONFIDENTIAL

ITEM	CENTRAL INTELLIGENCE AGENCY EMPLOYEES UNDER CIARDS	CENTRAL INTELLIGENCE AGENCY EMPLOYEES UNDER CSRS	OTHER U.S. GOVERNMENT AGENCIES NOT IN INTELLIGENCE COMMUNITY
..iding of double indemnity clause ... non-Agency life insurance	Can occur when required to fly on non-scheduled or military flights	Can occur when required to fly on non-scheduled or military flights	Normally not required to fly non-scheduled or military aircraft
..ffect of publicity adverse to the ..mploying organization	Has closed out job opportunities in private institutions	Has closed out job opportunities in private institutions	Never a bar to employment in private industry
Opportunity to counter publicity adverse to the employing organization	Never permitted	Never permitted	No bar to public or private discussion or debate

ILLEGIB

CONFIDENTIAL

SECRET

28 August 1970

MEMORANDUM OF LAW

SUBJECT: Authority of the Director of Central Intelligence to Establish a Qualified Pension Trust for Agency Employees as a Supplement to the Civil Service and Central Intelligence Agency Retirement Systems

1. The District Director of Internal Revenue has requested technical advice from the National Office, IRS, on the following questions concerning the Government Employees Voluntary Investment Plan, a pension plan and trust to supplement the retirement benefits of employees of the Central Intelligence Agency who are participants in the Civil Service Retirement System or the Central Intelligence Agency Retirement and Disability System.

(1) Does the Director of the Central Intelligence Agency have the authority to establish a pension plan for employees of the Agency?

(2) Who is the employer of the CIA employees--the Agency or the Government?

(3) May this plan be considered as supplemental to the Civil Service Retirement System and the Central Intelligence Agency Retirement and Disability System, so that the three plans may be viewed as a single unit for qualification purposes?

(4) Due to the make-up of employees, may the District Director waive information with respect to the coverage under this plan?

SECRET

2. I would dispose of question (4) by stating that the Agency will provide the Service with evidence of the plan's compliance with coverage requirements although security limitations imposed by statute may cause us to submit the information in classified form or in a manner other than normally expected by the Service.

[redacted]

Question (2) - Who is the employer of the CIA employees--the Agency or the Government?

3. We understand that the Income Tax Division of the Service takes the position that the United States is the employer of CIA employees and that, therefore, the plan must be established by the United States to meet the requirement of Internal Revenue Code § 401(a) and the regulations thereunder that a qualified plan be established by an employer for the exclusive benefit of his employees or their beneficiaries. We would contend that employment by the United States and by an agency thereof are not mutually exclusive and that, therefore, the Central Intelligence Agency can also be considered the employer. Rev. Rul. 58-599, 1958-2 C.B. 45, in a case involving eligibility for the sick pay exclusion of a disability retired Army officer re-employed in another Government agency, states that the relationship of employer and employee is between the United States and the re-employed individual. While this Rule is reasonable in the context of the case, it need not be controlling and can be distinguished in a case involving different facts and another section of the Code. This is especially so where otherwise it would be more difficult to carry out the clear intent of Congress that the Director of Central Intelligence have extraordinary powers in the employment and management of personnel of his Agency. Rev. Rul. 58-599 cites section 31.3401(d)-1(d) of the Employment Tax Regulations in defining the employer-employee relationship. That regulation also supports the proposition that for some purposes an employer-employee relationship may exist between an agency of the Government and employees of the United States employed in that agency.

> "The term 'employer' embraces not only individuals and organizations engaged in trade or business, but organizations exempt from income tax, such as religious and charitable organizations, educational institutions, clubs, social organizations and societies, as well as the governments of the United States, the States, Territories, Puerto Rico, and the District of Columbia, including their agencies, instrumentalities, and political subdivisions." (emphasis added)

4. This is not to argue that employees of the Central Intelligence Agency are not employees of the United States in the sense of being federal employees, but it is to contend that an employer-employee relationship exists between them and the Agency. To concede this point in the case of Agency employees does not establish a precedent for all Government employees for all purposes. For example, a distinction can be made for purposes of section 105(d) of the Internal Revenue Code, as in the case of Rev. Rul. 58-599. Similarly, it would be more difficult to argue that a department or agency whose employees occupy positions subject to Civil Service rules and the acts controlling compensation and benefits of Government employees in general should be considered the employer for purposes of section 401(a) of the Code. On the other hand, a good case for the existence of a dual employer-employee relationship can be made for an organization like TVA, a Government corporation which has been given a considerable degree of independence in its employment and management of personnel. In the case of the Central Intelligence Agency, the Congress has excepted the Agency and its employees from many of the laws governing the rights, benefits and control of Government employees, including the Classification Act, Veterans' Preference Act and civil service and judicial procedures for appeal of personnel actions. The Director has extraordinary powers in these areas which can be said to create a de facto employer-employee relationship. The fact that for some purposes in law the relationship is with the United States should not rule out the existence of the relationship with the Agency for other purposes.

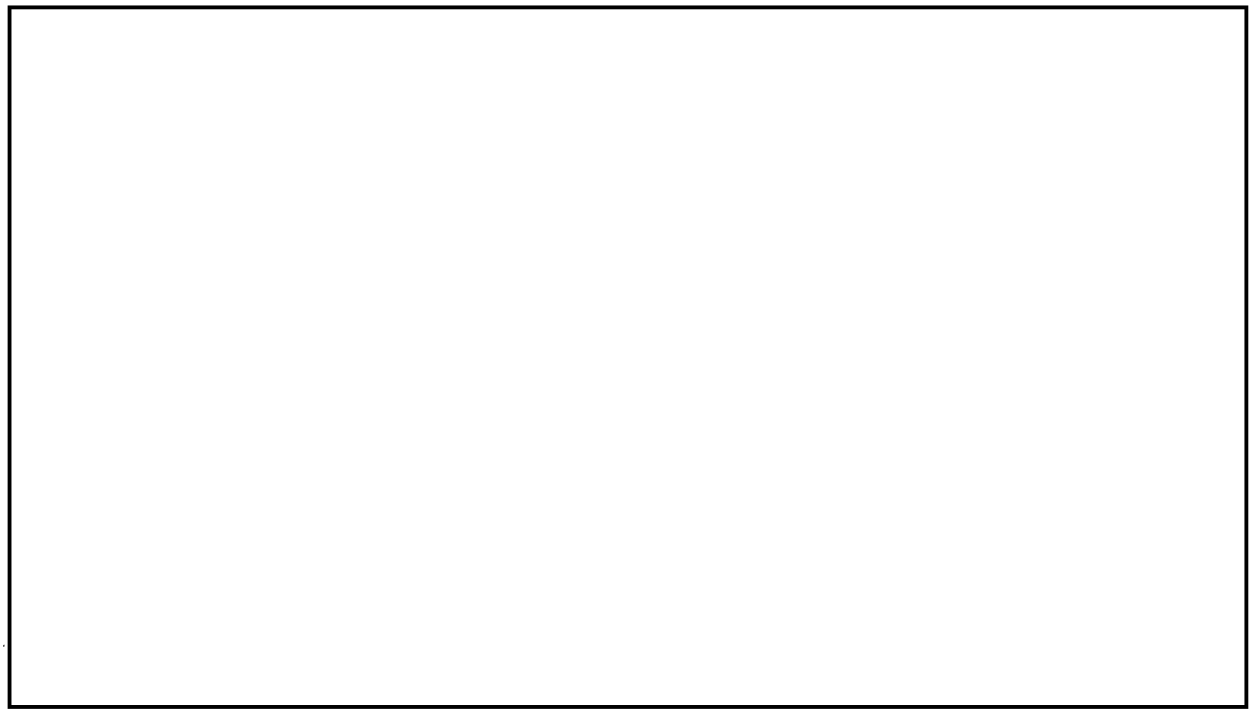
5. The practical result of the unusual status of Agency employees and the extraordinary powers of the Director is inequitable if the Agency cannot be considered the employer for purposes of establishing benefits commonly offered by employers, although the Director may exercise other employer prerogatives not normal in

Government agencies and without regard to laws designed to protect or benefit Government employees. Agency employees recognize that they are federal employees, but the special strictures and requirements of their employment cause them to look to the Agency and not to the Congress, courts or another part of the Executive Branch, such as the Civil Service Commission, for establishment or adjudication of their rights and benefits. Their marriages, social associations, and travel are subject to Agency approval; they cannot acquire Civil Service status; have no intra-agency "bumping rights" during a reduction in force; and must retire earlier than other Government employees. Their inability to reveal job duties and the effect of sensational adverse publicity about the Agency disqualifies them from many job opportunities with private institutions. For the same reasons, they are often uninsurable or their insurance contains exclusions related to their official duties or places of assignment. Because of the insurability problem, the Agency has found it necessary to sponsor an internally administered program which permits employees to replace at least some private coverage lost or unavailable because of their employment and which resolves security problems through the underwriters' agreement to pay claims without knowing the place or cause of death or even the identity of the insured.

6. Agency employees have no outside appeal or recourse in the event of separation under the Director's authority in section 102(c) of the National Security Act. Kochan v. Dulles, Civ. No. 2728-58 D.C.D.C. (20 May 1959); Torpats v. McCone, 300 F. 2d 914 (1962), cert. denied, 371 U.S. 886; Rhodes v. United States, 156 Ct. Cl. 31 (1962), cert. denied, 371 U.S. 821. They cannot have their day in court in pursuing claims against the Agency which would require presentation of evidence concerning their duties, associates or activities. Totten v. U.S., 92 U.S. 105 (1876); De Arnaud v. U.S., 29 Ct. Cl. 555, 151 U.S. 483 (1894); Allen v. U.S., 27 Ct. Cl. 89 (1892); Tucker v. U.S., 118 F. Supp. 371 (1954). In all of these situations, Agency employees must look to the Director and abide by his rules and decisions, but they also know that the Agency "looks out for its own" and does what it can to offset or compensate for disadvantages they accept with Agency employment.

7. Some of the most serious disadvantages in Agency employment are the risks of "selection-out" and early retirement. To maintain efficiency in a demanding field, the Agency "selects out", i.e., fires, its least effective employees even though their

performance might not subject them to separation in another Government agency. Others may be required to retire at age 50. Under the terms of the CIA Retirement Act, involuntary retirement is a final and conclusive determination of the Director and not subject to review by any court. Whether fired or forcibly retired, they are at an age where other employment is necessary yet hard to find because they have worked in a unique field or cannot reveal the details of their experience, or both. Finally, no matter how proficient their services have been, they will be required to retire at age 60, when many will be facing their greatest financial obligations. The primary reason for establishment of the Voluntary Investment Plan was to attempt to mitigate the hardship in early termination and retirement by providing an opportunity for employees to supplement their financial reserves and retirement incomes. This is the kind of offsetting benefit which enables employees to accept other limitations inherent in their jobs. We think it is also the kind of managerial action the Congress expected in granting extraordinary powers to the Director. To rule that he cannot act, either because the Agency is not the employer or because he is not acting for the United States, may be both an impractical and inequitable decision. We think the Congress intended him to be able to take such action and that the law permits him to do so.



Question (1) - Does the Director of the Central Intelligence Agency have the authority to establish a pension plan for employees of the Agency?

9. If a pension plan for Government employees must be established by the United States, who is authorized to act for the United States in establishing the plan? Clearly, Congress can do so by legislation, such as that establishing the Civil Service Retirement System. It does not follow, however, that only Congress may establish a plan. Absent a valid congressional prohibition, it would seem that the head of an executive department or independent agency has implicit authority to do so. It has been long established that the head of a Government agency need not show express authority for everything he does in administering his agency. As early as 1833, the Supreme Court said in United States v. MacDaniel, 7 Pet. 1, 13-14, 8 L. Ed. 587:

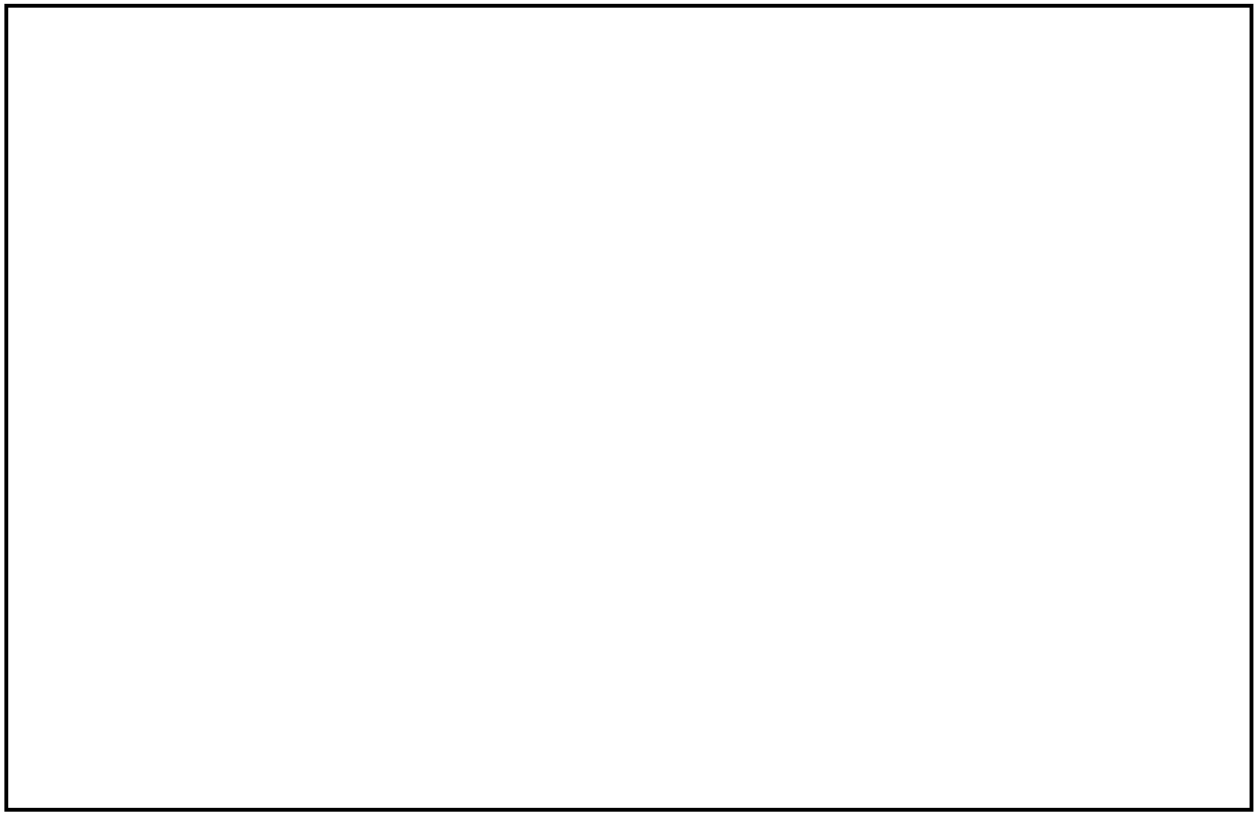
> "A practical knowledge of the action of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow, that he must show statutory provision for everything he does."

Also see 28 Op. Att'y Gen. 124; In re Neagle, 39 Fed. 833, 860 (1889) and United States v. Ahtanum Irrigation District, 236 F. 2d 321, 336 (1956).

10. It follows that if an act of an agency head is not expressly prohibited and is one which will contribute to the efficient operation of his agency, its validity depends only upon the authority to expend appropriated funds to carry it out. Section 3678, Revised Statutes, 31 U.S.C. § 628 provides:

> "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others." FOIAB5

This provision of law would prevent the expenditure of appropriated funds to establish and maintain a retirement system unless other statutory authority existed. For example, the authority in section 3 of the Tennessee Valley Authority Act to appoint employees and provide a system for efficiency has been held to authorize the establishment by that agency of its retirement system. Tennessee Valley Authority v. Kinzer, 142 F. 2d 833, 837 (1944).



12. The Comptroller General does not conduct a regular review of Agency expenditures, but from time to time is consulted and on rare occasion has issued decisions concerning the authority of the Director to expend funds appropriated to the Agency. The most recent decision of the Comptroller General pertinent to the question under consideration is 44 Comp. Gen. 89 (1964), on the authority of the Director to grant retroactive pay increases. Since the Agency is not subject to the Classification Act but has elected to use the schedules thereunder in compensating most of its employees, the Director has provided by regulation that statutory adjustments of salaries in the Classification Act will be given effect whenever the law is amended and will have the same effective date as salary adjustments for Government employees whose salaries are set by the Classification Act. Sometimes the result of this regulation is to grant retroactive pay increases to Agency employees by administration action. The Comptroller General held that this is a valid exercise of the Director's discretionary authority, although normally an administrative retroactive authorization for expenditures could be provided only by statute.

13. There is another illustration of the Director's authority to expend appropriated funds for pension plans which is quite pertinent here. Frequently individuals are retained by the Agency under contracts or appointments which do not qualify them to participate in the Civil Service or CIA Retirement Systems. In some cases they also fail to qualify for Social Security coverage. It may happen that their service is extended for a period of time or in a way not originally contemplated, making it equitable at the time their services are terminated to provide them with retirement benefits. In those cases, the Director expends appropriated funds to provide such benefits, including the purchase of annuities tailored to the needs of each case. This has been Agency practice for many years and presumably will continue to be. The congressional subcommittees responsible for this agency are aware of many of these cases and have interposed no objections.

14. A further example of the Director's extraordinary authority is in the establishment and management of what the Agency has come to call "proprietaries". These are wholly owned organizations,

usually corporations established and run by the Agency to carry on Agency activities of various kinds. For practical purposes, they are much like Government corporations, but unlike regular Government corporations, they are not created by an act of Congress but by the Director of Central Intelligence. Some of them have qualified pension plans for their employees. The Congress is also aware of the existence of these corporations and not only does not object, but clearly has approved of them by continuing to appropriate funds for the Agency with no restriction on their use for this purpose.

15. For obvious reasons, it is necessary for the Agency to avoid litigation, and consequently there are few appellate decisions to rely upon as precedent in interpreting the statutes granting the Director his authority. Those few cases that do exist do not rule upon the expenditure of funds appropriated to the Agency. Aside from 44 Comp. Gen. 89 on the authority of the Director to grant retroactive pay increases by administrative action, most of the interpretations of the statutes governing the Agency are in classified decisions of the CIA Office of General Counsel. The Director has relied upon his General Counsel's decisions from the inception of the Agency, and the authority of these decisions is buttressed by the implicit approval of the Congress of his administrative actions and expenditures made on the basis of them. In Montague v. United States, 79 Ct. Cl. 624, 633 (1934), it was said:

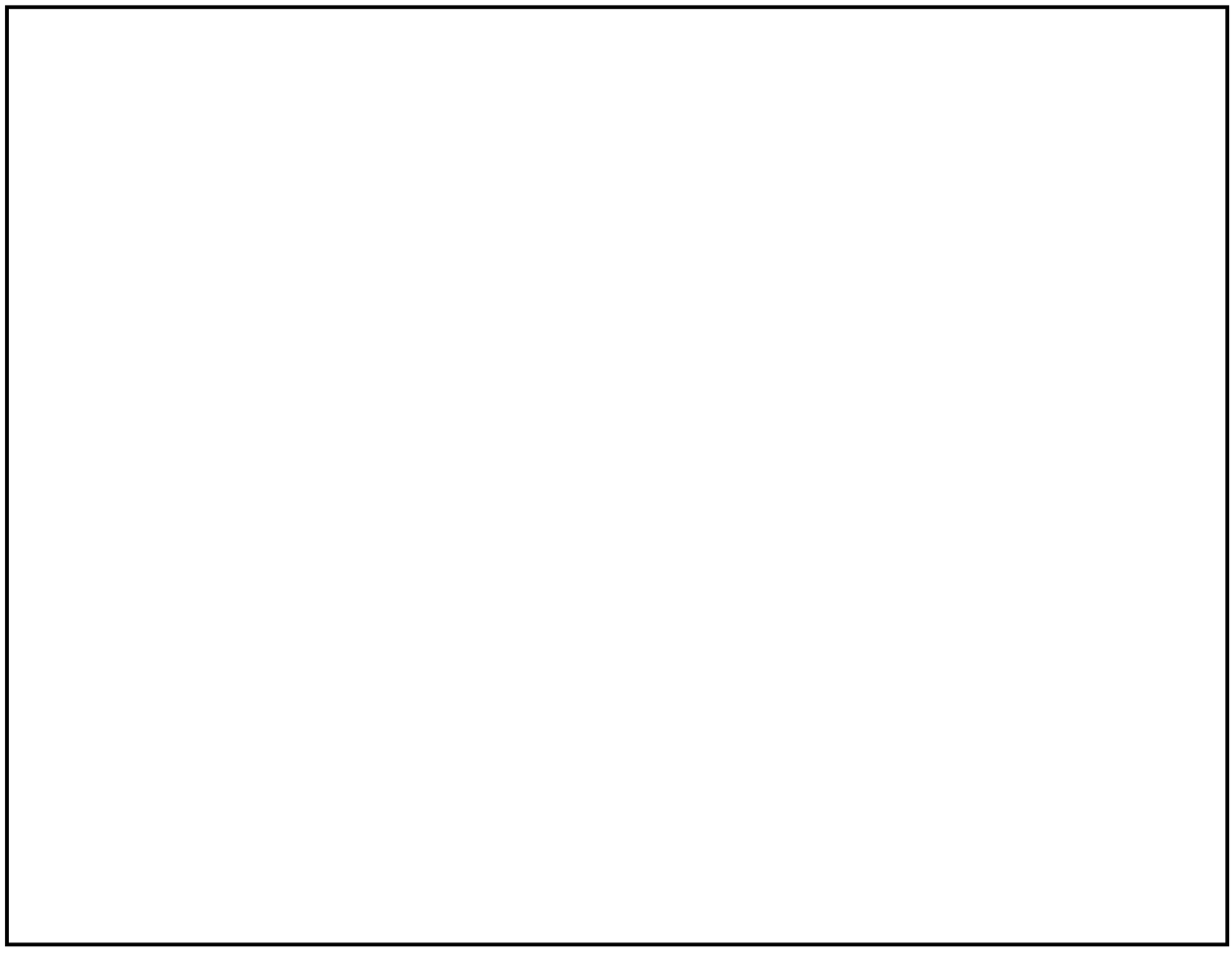
> "The rule is well established that the construction placed upon a statute by the Executive Department of the Government charged with its administration is entitled to great weight and ought not to be overruled except for cogent reasons, and unless it is clear that such construction is erroneous. In United States v. Moore, 95 U.S. 760, it was said:
>
> > 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat. 210; United States v. State Bank of North Carolina, 6 Pet. 29; United States v. MacDaniel, 7 id. 1. The officers concerned are

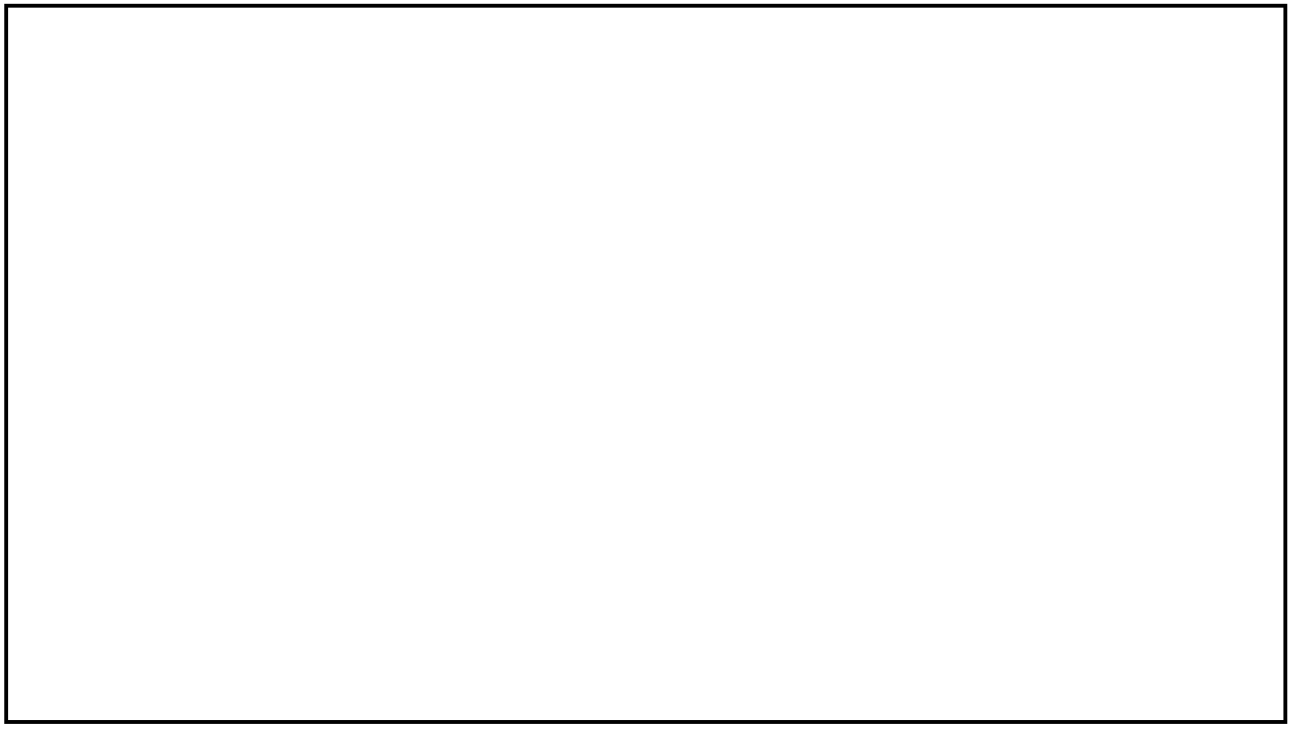
usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.'

"In United States v. Johnston, 124 U.S. 236, the rule is stated as follows:

'In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.'"

FOIAB5





FOIAB5

17. Although cost to the Government here is almost an intangible item in that it involves only the use of personnel already concerned with the administration of Agency personnel policies and employee benefits, there is admittedly some expenditure of funds even if this expense is difficult to segregate. However, the precedent for such expenditures is well established in this Agency and we suspect in some Government agencies subject to ordinary budgetary controls. From the early days of the Agency until the enactment of the Federal Employees Government Life Insurance Act of 1954 and the Federal Employees Health Benefits Act of 1959, the Agency provided voluntary group life and health insurance plans. The cost of establishing and maintaining these plans was paid by the Agency, while the insurance premiums were paid by the employees who elected to participate. The existence of these programs was known to our congressional committees, and they had no objection to them.

18. There are other Government retirement systems for employees of the United States created by administrative action without specific legislative authority. The outstanding examples are the retirement systems of the Army and Air Force Exchange Service and the Tennessee Valley Authority. Revenue Ruling 70-71: I.R.B. 1970-7, 6, concerns the Army and Air Force Exchange

Service retirement system. The Ruling points out that the Exchange Service operates under the authority of Department of Defense regulations and is an instrumentality of the United States. Control of the Exchange Service is vested jointly in the Secretaries of the Army and Air Force, who have issued joint regulations for its administration. The retirement system was established by such joint regulations. Accordingly, the Revenue Ruling states that a pension system established by the Exchange Service is established by the United States. The obvious distinction that can be made between the Army and Air Force Exchange Service and the Central Intelligence Agency is that the former is a nonappropriated fund activity. However, as we have seen above, this distinction is not pertinent here since the Director of Central Intelligence has authority to expend appropriated funds without a specific appropriations authorization other than that in the CIA Act. In any case, the plan established by the Director involves no employer contributions and only an indirect expenditure like other expenditures for the support of employee benefits and services.

19. The Tennessee Valley Authority pension plan was created by the head of that agency not by an act of Congress. At the time the plan was established, employees of Government corporations were not covered by the Civil Service Retirement System. While the coverage of the Civil Service Retirement System was subsequently broadened by Congress to include virtually all employees of executive agencies of the Government, members of the TVA retirement system were not covered because of the statutory exclusion of employees subject to another retirement system for Government employees. There is congressional confirmation of the status of TVA employees as employees of the United States in the fact that Congress has continued to appropriate funds which enable TVA to make its employer contributions to the system. It is also clear from the various chapters of 5 U.S.C. relating to Government agencies and Government employee benefits that the Tennessee Valley Authority like the Central Intelligence Agency is an executive agency of the United States, and its employees are employees of the United States. 5 U.S.C. § 105, 305(a), 2101-2105, 5102, 6301, 8331.

20. The distinction which can be made between TVA and CIA is that TVA has a corporate entity. Again, this distinction is not controlling for our purposes. Because of TVA's industrial and

revenue producing activities, a Government corporation was desirable to permit it to sue and be sued, to contract, and to expend revenues without the normal appropriation and expenditure restrictions placed upon Government agencies. However, even for purposes of litigation, its corporate status is by-passed in cases of torts of its employees. For this purpose too, a Government corporation is a federal agency and its employees are federal employees. 28 U.S.C. § 2671. Handley v. Tecon Corp., 172 F. Supp. 565 (1959); Wickham v. Inland Waterways Corp., 78 F. Supp. 284 (1948). In spite of its corporate status, Federal District and Appeals Courts have ruled in at least four cases involving employee rights and benefits or obligations that TVA employees are employees of the United States. Posey v. TVA, 93 F. 2d 726 (1937); TVA v. Kinzer, 142 F. 2d 833, 836 (1944); Hill v. Schaeffer, 221 F. 2d 914, 915 (1955); TVA v. Local Union 110, F. Supp. 997, 1000 (1962). Kinzer is of particular interest in that it deals at some length with the TVA and Civil Service Retirement Systems.

Question (3) - May this plan be considered as supplemental to the Civil Service Retirement System and the Central Intelligence Agency Retirement System, so that the three plans may be viewed as a single unit for qualification purposes?

21. If the plan established by the Director is considered to have been created by the United States, all three plans have been established by the same employer, meeting the requirement of Internal Revenue Regulations § 1.401-3(f) for the designation of several trusts or plans as constituting one plan for qualification under Code § 401(a)(3). The unusual situation here, of course, is that two of the plans were created by Congress and the third one by administrative action. If the Director has authority to establish a retirement plan for certain employees of the United States and if Congress interposes no objection, there would seem to be no reason that the three plans may not be viewed as a single unit for qualification purposes. The staffs of the congressional committees responsible for this Agency have been advised orally of the Director's intention to establish this plan. They indicated no objection and did not ask for details, which will be provided to the committees at an appropriate time.

SECRET

22. From the point of view of compliance with the Internal Revenue Code, the remaining question then is whether or not there is discrimination in that this plan is limited to employees of one agency. Section 401(a)(3) of the Code permits an employer to designate several pension, stock bonus, profit-sharing, and annuity plans as constituting parts of a plan which he intends to qualify under such section. If all of the plans so designated cover a sufficient portion of all employees, there is no requirement that a definite share be included in any one plan. Regulations § 1.401-3 permits an employer to set up a classification of employees limited to those who have been employed in certain designated departments. Rev. Rul. 65-178, pt. 4(c), C.B. 1965-2, 94, 112. Although our plan is limited to a certain group of Government employees, it seems to us a reasonable classification. For reasons related to the peculiar nature and places of service of many of our employees, their decreasing efficiency and fitness for continued service at a relatively early age, and the need to assign younger men to many of the jobs, we have recently established a policy requiring employees to retire at age 60. This is also the mandatory retirement age for members of the CIA Retirement and Disability System, and in addition employees are permitted and encouraged to retire as early as age 50 and may be required by the Director to do so. Because of the financial hardship evident in the cases of many employees required to retire early, the Agency has sought a means to provide supplemental retirement benefits. This plan established by the Director is thought to be at least a partial answer to the problem. For this reason, we think that Agency employees represent a reasonable classification permitting limitation of this special coverage to them.

23. The only discrimination prohibited by the Code and Regulations is one which favors stockholders, officers, supervisors, or highly compensated employees. There is no question of such discrimination here. The plan applies to the vast majority of employees with the principal limitation being that they be participants in the Civil Service or CIA retirement systems. As a further assurance against discrimination in favor of highly compensated employees, the minimum contribution is set low enough so as not to be burdensome even to lower grade employees. If the plan were ruled to be separate and distinct from the Civil Service and CIA systems and if the Internal Revenue Service held to its position that such a separate plan must

have a fixed compulsory contribution, the CIA plan, in losing its voluntary and flexible contribution feature, would become either burdensome for lower paid employees or unattractive to many other employees. As employees were promoted and their salaries increased, they would not be able to make the contributions within their financial means which would provide an acceptable level of supplemental retirement benefits. The present position of the Service on compulsory contributions in separate plans would also destroy the limited loan and withdrawal features of this plan which make it more attractive to lower paid employees, who are already contributing a substantial amount to their basic retirement plans and who realize they may have unexpected need for the supplemental contributions they make to this voluntary plan.

24. For the reasons stated in the immediately preceding paragraphs, we believe the plan established by the Director should be qualified as a retirement plan of the United States and considered a part of the Civil Service and CIA plans. In the event that the Internal Revenue Service feels the plan can be qualified only as a separate and distinct one, we suggest a review of the position of the Service that such employee only plans must have only compulsory contributions at the same rate for all employees, no part of which may be withdrawn except upon separation or retirement. We believe the history and context of the Internal Revenue Code and Regulations indicate an intention that such compulsory contributions be those of the employer. A more reasonable alternative, short of permitting only voluntary contributions, would be to permit voluntary contributions within the 10% rule to supplement a compulsory employee contribution. The plan established here is a voluntary one, and it seems questionable whether a plan can be truly voluntary and have only compulsory employee contributions.

25X1

[redacted]

Assistant General Counsel